United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

989

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,004

UNITED STATES OF AMERICA,

Appellee

v.

NATHAN L. DREW,

Appellant

Appeal from the United States District Court
for the District of Columbia

THOMAS PENFIELD JACKSON

1828 L Street, N.W.
Washington, D.C. 20036

Attorney for Appellant

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Defense Motion for judgment of acquittal overruled. (Tr. 106-114).

STATEMENT OF ISSUES

1. In a prosecution for forging and uttering three credit sales slips, allegedly negotiated for automotive products, was evidence of twenty-five other alleged forgeries not charged, but attributed by the prosecution to the defendant who denied knowledge of any of the transactions, admissible as probative of intent or common scheme, or inadmissible and prejudicial as cumulative evidence of habitual misconduct?

2A. Was the prosecutor obliged to disclose to the defense a police report inconsistent with the author's testimony as to a fact common to the commission of two otherwise unrelated crimes?

2B. Was the prosecutor's repeated and erroneous statement of the evidence of such common fact in closing argument prejudicial?

3. Was cross-examination of defense witnesses by the prosecutor prejudicial in disclosing the fact that both witnesses were or had been in jail on charges not concluded by final conviction?

4. Were the documents allegedly forged, which purported to bear evidence of their uttering in unidentified writing elsewhere on the instruments, properly authenticated by and admitted upon proof of defendant's alleged signature thereon alone, or were such documents inadmissible without authentication of the unidentified writing, and the Government's proof of uttering insufficient to submit the charges of uttering to the jury?

This case has not previously been before this Court.

STATEMENT OF THE CASE

Statement of Facts

On or about October 26, 1968, an Esso credit card number 341-364-684-4, issued to one "Theodore G. Cooper" was discovered missing from Mr. Cooper's wife's purse. (Tr. 41-42; 103; Government Exhibit No. 1).

Sometime after 5:50 p.m., December 3, 1968, the Hertz car rental company discovered one of its automobiles, a red Ford sedan registered in Maryland with license plate number "CB 7027," missing from its depot at Washington National Airport in Virginia. (Tr. 34, 37).

At about 12:00 noon, on April 25, 1969, the Hertz automobile was observed by a detective assigned to the auto theft unit of the Metropolitan Police Department parked in front of 3455 Minnesota Avenue, S.E., bearing Maryland license plate number "DD 1856," a number assigned by the Maryland Department of Motor Vehicles to a 1969 Rambler owned by the Avis car rental company (Tr. 54, 58). Shortly thereafter the appellant Nathan L. Drew was seen by the detective and his partner to enter the automobile (alone and driving, according to the police officers (Tr. 59-60); in company with an acquaintance of his brother's and as passenger, according to Drew (Tr. 167-169)); was followed in their car by the officers to the parking lot of a nearby shopping center (Tr. 60, 64-65); and was placed under arrest in the parking lot when he was unable to produce a registration card for the automobile (Tr. 60-61). During appellant's futile search for registration papers at the time of his arrest, the Esso credit card issued to Theodore G. Cooper was found (in plain view among

the contents of Drew's wallet while he examined them, according to one officer (Tr. 67); produced by the officer himself, according to Drew (Tr. 171)).

On August 25, 1969, an indictment in eight counts was filed as Criminal Number 1382-69 in the United States District Court for the District of Columbia, charging Nathan L. Drew with interstate transportation of the Ford automobile alleged stolen from the Hertz corporation (First Count, 18 U.S.C., § 2312); unauthorized use of the same vehicle (Eighth Count, District of Columbia Code, § 22-2204); and three counts each of forging the name of "Theodore G. Cooper" to sales slips recording credit sales of merchandise by the Humble Oil and Refining Company (Second, Fourth, and Sixth Counts, District of Columbia Code, § 22-1401), and uttering those slips to various persons on December 6 and 16, 1968, and February 17, 1969 (Third, Fifth, and Seventh Counts, District of Columbia Code, § 22-1401).

Drew entered a Plea of Not Guilty on September 5, 1969. At trial December 22-24, 1969, defendant was found guilty on all counts, and judgment of conviction entered on February 12, 1970, by the trial judge who sentenced the defendant to terms of imprisonment of 18-54 months on each of the first seven counts, and one year on the eighth count, all terms to run concurrently.

Proceedings Below

At trial, the Government called, among others,Metropolitan Police Detective Robert J. Long who testified that while on duty on April 11, 1969, approximately two weeks before Drew's arrest, he had observed a 1969 Rambler

automobile bearing expired Maryland license plates "CB 7027" at an unspecified location.[1/] (Tr. 54-55). Recognizing the car as an Avis vehicle, Detective Long checked with Avis and learned that the tag number obtained for it by Avis in Maryland was "DD 1856," and also learned that the "CB 7027" license plates had been assigned to the Ford registered to Hertz. (Tr. 56).

He was then asked:

> "Q. After you found the Rambler that belonged to Avis with the wrong tag on it, did there come a time a couple weeks later when you came upon a Ford with registration -- with the serial number CB 7027? (Tr. 56).
>
> . . .
>
> "Q. Officer, on April 23rd, 1969, did you see any vehicle in the District of Columbia that had the tags that belonged to the Avis Rambler which you had already found?
>
> "A. Yes, sir." (Tr. 57).

Long went on to testify that he had observed them on a red 1969 Ford he later learned to have been "stolen" from Hertz "parked in front of 3455 Minnesota Avenue, Southeast" (Tr. 57-58), but that vehicle was gone after he returned from his inquiry into ownership. (Tr. 58).[2/] He next saw it on April 25, 1969, immediately prior to the defendant's arrest, at which time it bore tag number "DD 1856." (Tr. 58).

1/ PD 202, "Continuation Report," signed by Officer Long, (Part of Government Exhibit No. 36) gives the point of observation as "parked in front of 3531 Jay Street, N.E."

2/ PD 202, "Continuation Report," supra, Note 1, states that the 1969 Ford observed by Officer Long on April 23, 1969, bore "Md. Reg. DD 1856."

Metropolitan Police Detective Stanley R. Walker corroborated Officer Long as to the circumstances of the defendant's arrest (without mention of license plate number, however), (Tr. 71-74), and was then shown Government Exhibits 2 through 29, and asked if he could identify them. (Tr. 74). [3/] Walker stated that he could, and that he had

> "...received these copies of credit cards from Pennsylvania from the Humble Oil and Refining Company after having a conversation with them on the phone. They mailed them to the Auto Squad Office." (Tr. 74).

Over defense objection that none of the credit sales slips had been properly authenticated (Tr. 75), and that the additional sales slips not charged in the Indictment were offered for the purpose merely of showing a propensity or disposition to commit a crime and would, thus, be prejudicial to the defendant without relevance to any issue raised by the evidence (Tr. 49-52), Government Exhibits 2 through 29 were admitted into evidence (Tr. 53, 75; 103-104), the additional sales slips as proof of a "common scheme or plan or intent." (Tr. 52-53). Officer Long then testified as to "what information is contained" on the credit sales slips, including the "license number of the car that the subject was operating at the time these credit cards were forged." (Tr. 76). Then he identified handwriting exemplar cards (Government Exhibits 30 and 31) obtained from the defendant in his presence (Tr. 79).

3/ Government Exhibits 2, 3, and 4, are carbon copies of the credit sales slips appellant was charged in Counts Two through Seven of the Indictment with forging and uttering (Tr. 47; Indictment, Counts Two through Seven). Government Exhibits 5 through 29 are also carbons of credit sales slips, not charged in the Indictment but also purporting to bear the signature of "Theodore G. Cooper," which the Government advised defense counsel it would offer in evidence four days prior to trial. (Tr. 48-49).

Mr. Irby Todd, a police department "document analyst," (Tr. 89) duly qualified (Tr. 91), testified that, in his opinion, the scrivener of Government Exhibits 30 and 31 also wrote the name "Theodore G. Cooper" on Government Exhibits 2 through 29, (Tr. 92), although admitting that he had compared none other than defendant's handwriting with the latter (Tr. 94).

The Government rested its case (Tr. 104), and the defendant's motions for judgment of acquittal on each count were apparently denied. (Tr. 104-114).

The defense case consisted of the testimony of the defendant, his brother, and an acquaintance. The defendant contended that he had not stolen the Hertz car and was merely an innocent passenger on the day of his arrest of one "William Bryant" or "Wayne O. Bryant," an acquaintance of his brother's, who was offering the car for sale. Bryant fled from the parking lot as the police officers arrived to arrest Drew (Tr. 166-169). The defendant was generally corroborated by two defense witnesses (including defendant's brother) both of whom were present when Bryant arrived at the Drew apartment with the Hertz Ford. (Tr. 117-122; 158-162).

Drew denied signing the name "Theodore G. Cooper" to any of the credit sales slips in evidence, (Tr. 172, 177), suggesting that he, too, had been the victim of a forger who might also have forged Cooper's name (Tr. 172, 203-247). He also denied taking the Hertz car, and denied driving it into the District of Columbia. (Tr. 174).

In rebuttal of defendant's assertion that he was an innocent passenger of "Bryant" in the Hertz car on April 25, 1969, the Government recalled

Officer Long who testified that Drew had stated, at the time of his arrest, that his brother had rented the car the week before, and then offered as corroborative evidence the PD 163, "Prosecution Report," (Government Exhibit 36), to which was attached the PD 202, "Continuation Report."

Defense motions for judgment of acquittal and mistrial were denied (Tr. 256-257). The jury returned a verdict of guilty as charged. (Tr. 317-318).

I. THE TRIAL COURT ERRED IN ADMITTING, AS PART OF THE GOVERNMENT'S CASE-IN-CHIEF, EVIDENCE OF "OTHER CRIMES" FOR WHICH THE DEFENDANT WAS NOT ON TRIAL.

The evidence of other forgeries was not relevant to a disputed issue, the defendant having denied committing those with which he was charged and no distinctive or unusual characteristics proved to associate them with defendant.

The Grand Jury charged Nathan L. Drew with forging the name of "Theodore G. Cooper" to three credit sales slips for automotive products delivered in exchange for those slips on December 6, 1968, December 16, 1968, and February 17, 1969. Nathan L. Drew denied any knowledge of those slips whatsoever. Thus, his intent, or his guilty knowledge was never a disputed issue (except in the general sense that intent is an element of the crimes charged), the only issue being whether he had signed them or passed them at all. Nevertheless, to prove a "common scheme or plan or intent" (Tr. 52-53), as a part of its case-in-chief, the Government offered into evidence twenty-five additional sales slips, upon the testimony of a handwriting expert who asserted that those,too, had been signed by the defendant. (Government Ex. 5-29).

Since the Government at no time ever produced further evidence bearing upon the circumstances of the execution of those sales slips, either those charged or the twenty-five additional sales slips--nothing to connect the defendant with the slips mentioned in the indictment through unusual or distinctive characteristics of the others--the effect (if not the purpose) of the evidence of twenty-five other instances of alleged forging and uttering was to imply guilt on the basis of sheer quantity of other alleged offenses. The evidence had no relevance to any controverted issue.

It is, of course, permissible for the Government to offer evidence of a defendant's criminal activity other than that on trial to impeach him, District of Columbia Code, § 14-305 (1967 ed.), if he has previously been convicted of the other crime, no appeal from the conviction remains pending at the time it is offered, Campbell v. United States, 85 U.S. App. D.C. 133, 176 F.2d 45 (1949), and the trial judge in his discretion concludes that the conviction reasonably bears upon the defendant's credibility as a witness rather than merely evincing his criminal proclivity. Gordon v. United States, 127 U.S. App. D.C. 343 F.2d 936 (1967).

And evidence of other events which may have been criminal if done as alleged may be offered by the Government to prove the offense on trial if it is relevant to: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing two or more related crimes; or, (5) the identity of the defendant as the perpetrator of the offense on trial. United States v. Gay, 133 U.S. App. D.C. 337, 410 F.2d 1036 (1969).

Otherwise, evidence of other offenses attributed to the accused is inadmissible. Boyd v. United States, 142 U.S. 450, 35 L.ed. 1077 (1892); Witters v. United States, 70 App. D.C. 316, 106 F.2d 837 (1939).

The reasons for exclusion have been most recently considered in detail in Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964) where, in reversing a conviction under both counts of a two-count indictment charging robbery and attempted robbery alleged to have been committed at different locations approximately two weeks apart, this Court held joinder of both charges in the same indictment, thus permitting evidence of "another" offense to contribute to the proof of each, prejudicial to the accused and requiring a new trial. The Court said:

> "The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.
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> . . .
>
> "It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, courts presume prejudice

> and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose." 118 U.S. App. D.C., 14-16 (emphasis supplied).

The Court proceeded to consider in the abstract instances in which such evidence would be admissible (i.e., when motive, intent, absence of mistake, a common scheme or plan, or identity are disputed), and stated:

> "When the evidence is relevant and important to one of these five issue, it is generally conceded that the prejudicial effect may be outweighed by the probative value." 118 U.S. App. D.C., 16 (emphasis supplied).

Then followed a minute examination of the evidence to determine whether testimony relating to one offense tended to prove a disputed element of the other. The similarities between the offenses ended at the point at which the perpetrator of each could be described as a Negro male wearing sunglasses and the corporate owner of the retail stores robbed in each found to be the same. The dates were more than two weeks apart. The locations were different. And the method by which the crimes were committed, although similar, probably indistinguishable from that anyone disposed to commit such crimes would employ. Moreover, the testimony and argument frequently referred indiscriminately to the "crimes". "On this record," the Court said, "we cannot say that the jury probably was not confused or probably did not misuse the evidence..." 118 U.S. App. D.C., 20.

Since the opinion in Drew, supra, the danger of inferring a "criminal disposition" and "cumulation" of some evidence of multiple crimes charged as substitutes for competent proof of any one has frequently been argued as a

reason for, and occasionally required, reversal of convictions obtained upon indictments charging separate offenses which "embarrassed and confounded" the defendant in presenting separate defenses. Cross, et ano. v. United States, 118 U.S. App. D.C. 324 F.2d 987 (1965); Gregory v. United States, 125 U.S. App. D.C. 7, 401 F.2d 185 (1966). In Baker v. United States, 131 U.S. App. D.C. 7, 401 F.2d 958 (1968), followed by Blunt v. United States, 131 U.S. App. D.C. 306, 404 F.2d 1283 (1968), the Court held that the acknowledged prejudice to the accused is justified by the expedience of joinder if the evidence of the "other" crime would be admissible in the course of the proof of each.

Unitl Gay v. United States, 133 U.S. App. D.C. 337, 410 F.2d 1036 (1969), however, the rationale of the rule excluding evidence of "other crimes" as articulated in Drew, supra, was considered only in relation to prejudice resulting from joinder of several distinct offenses in a multiple-count indictment. In Gay, supra, the rationale, equally applicable to evidence of "other crimes" not charged at all, was first held by the District of Columbia Court of Appeals to be inadmissible, applying the criteria of Drew. Gay v. United States, 241 A.2d 446 (D.C. App. 1968). This Court reversed on the Government's appeal, holding that evidence of similar transactions with other persons, in a prosecution for larceny after trust in which defendant did not deny his participation but only its nature and extent, was relevant to the intent with which he acted when he refused the return of the complainant's property, provided, however, that the trial court had given the jury (as it had) express limiting instruction on the purpose for which the evidence was

offered. In a concurring opinion, Judge Fahy questioned whether the exceptions to the rule of exclusion of evidence of "other crimes" ought not to be limited to offenses "...closely related in time and continuity to the offense on trial..." 133 U.S. App. D.C., at 341.

Whether the five-point formula of Drew represents an adequate working rule to determine when evidence of "other crimes" will be an exception to the rule of inadmissibility, or whether the list of exceptions is so general as to consume the rule, the most recent case suggests that the exceptions will be strictly construed. In United States v. Bussey (U.S. App. D.C. No. 22, 919, decided July 21, 1970) this Court reversed a conviction for robbery upon the Government's evidence, offered to rebut defendant's alibi testimony, that the defendant had been observed committing another robbery during the interval accounted for by his alibi. The Government contended the evidence admissible under the "identity" and "common scheme or plan" exceptions to the exclusionary rule of evidence of "other crimes." The Court held that the evidence should have been rejected as offered, since it neither "identified" the defendant with any more precision than he had already been identified as the perpetrator of one unremarkable robbery, nor was it "presented with scrupulous care" to avoid details of the earlier crime in refuting the alibi, and its "inflammatory effect" therefore exceeded its limited "probative value." Slip Opinion, p. 6. Moreover, even though the trial court gave a "similar offense" instruction in its general charge to the jury, it should have done so at the time the evidence was offered, and its failure to do so left the prejudice both unabated and unabatable. The Court concluded by prescribing,

as a procedure approprate to determine the circumstances under which such evidence might be rendered admissible in rebuttal, a bench conference and hearing with the jury absent.

In the instant case, the Government offered the evidence of the twenty-five additional forgeries, upon four days' notice of its purpose to do so, as proof of a "common scheme or plan or intent." (Tr. 48-53). It did so, not in rebuttal, (compare Bracey v. United States, 79 U.S. App. D.C. 23, 142 F.2d 85 (1944), but in its case-in-chief. No cautionary instruction was given by the trial court, either at the time the evidence was received or in its charge, as to the limited use to be made of the evidence (compare Gay, supra). While "fraudulent intent" is undoubtedly an element of the offense of forgery, Easterday v. United States, 53 App. D.C. 387, 292 F. 664 (1923), the Government anticipated, certainly not later than its efforts to obtain samples of the defendant's handwriting in June of 1969, that the defense would claim Nathan L. Drew never wrote the name of "Theodore G. Cooper," not that he did so but innocently. Cf. Harper v. United States, 99 U.S. App. D.C. 324, 239 F.2d 945 (1956), and Gay, supra, (in which the intent with which admitted conduct was engaged in was very much in dispute) and Erving v. United States, 296 F.2d 320 (9th Cir. 1961)(in which the defense denied the transaction altogether). The time span encompassed in the forgeries charged in the indictment extended from December 6, 1968 (Government Exhibit No. 2) to February 17, 1969 (Government Exhibit No. 3). Of the "other" forgeries, seven appear to have occurred prior to December 6,

1968 (Government Exhibits Nos. 5-11), and one subsequent to February 17, 1969 (Government Exhibit No. 28). This Court has held that evidence of the accused's culpable knowledge of later transactions, and even the later transactions themselves, are not probative of his intent in the earlier ones. Witters v. United States, 70 App. D.C. 316, 106 F.2d 837 (1939); McHale v. United States, 130 U.S. App. D.C. 163, 398 F.2d 757 (1968).

In Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964), the Government relied upon similarities between the offenses charged (and the fact that respective victims identified defendant as the culprit in each) to justify their joinder in the same indictment. This Court found the similarities to be no more striking than the differences (the procedure followed by the would-be robber in each offense without anything in particular to distinguish it from any other robbery) and the tendency of both witnesses and lawyers to refer to "the robberies" indiscriminately productive of the prejudicial "cumulative" effect, requiring reversal for new (and separate) trials on each count.

In the instant case, the "other forgeries" attributed to Nathan L. Drew all, of course, appear to involve signing the name of "Theodore G. Cooper" to credit sales slips negotiated for automotive supplies at Humble Oil & Refining Company stations. And Nathan L. Drew is identified as the culprit in each instance by the handwriting expert (Tr. 91-92). However, all the credit sales slips purport to have been negotiated at numerous different service stations, both within and without (Governemnt Exhibits Nos. 28,29) The District of Columbia, by persons driving cars with no less than

eight different license numbers,[4/] and with an unidentified name and address appearing on the back of one (Government Exhibit No. 11). Nothing on the face of the slips, or in the evidence relating to them, distinguishes any one of the "other" sales slips from any other credit sales slip with which everyone is generally familiar. Nothing characterized it as an overt forgery. Nothing connects it (except by the handwriting expert) with Nathan L. Drew. No distinctive "scheme" emerges from a comparison of the forgeries charged with the others. Nothing appears to indicate whether the writer of any one intended to write another, or wrote with specific knowledge of his lack of authority to do so. And here; too, the handwriting expert, (Tr. 92) and police officer (Tr. 74, 76) testified, and prosecutor argued, indiscriminately about "these 28 charge slips from Esso...these 28 contested documents..." (Tr. 262) referring to both those for which Drew was on trial and those he was not.

In summary, if Nathan L. Drew was entitled to a new trial because the Government offered evidence of his alleged commission of two unrelated robberies in the same trial, having been charged with both and on notice of his need to defend against both, a fortiori, he is entitled to a new trial upon the Government's evidence of twenty-eight unrelated alleged forgeries when he had no reason to anticipate more than three until immediately before trial.

4/ Md. CB 7027 (Government Exhibits Nos. 2-4, 12, 15, 17, 23, 25-27, 29)
D.C. 551-837 (Government Exhibit No. 5)
Md. CW 3721 (Government Exhibit Nos. 6-9)
D.C. RA 1533 (Government Exhibits Nos. 10-11)
Md. GF 7027 (Government Exhibit No. 13)
Md. CB 7028 (Government Exhibit No. 16)
Md. CB 702 (Government Exhibit No. 24)
Md. CW 7027 (Government Exhibit No. 28)

II. THE PROSECUTOR FAILED TO DISCLOSE A MATERIAL VARIATION BETWEEN POLICE TESTIMONY AND A PRIOR WRITTEN STATEMENT OF THE TESTIFYING OFFICER, AND THEREAFTER MISSTATED THE EVIDENCE ACTUALLY GIVEN IN CLOSING ARGUMENT.

A. The police officer's report indicated a license plate number on the stolen car which differed from that to which he testified and his testimony connected defendant and the stolen automobile to the alleged forgeries through a common license plate number.

In its examination of Detective Long, the officer who made the arrest of Drew on April 25, 1969, the Government established that approximately two weeks earlier he had observed a 1969 Rambler automobile, owned by the Avis car rental company, bearing expired Maryland license plates number "CB 7027." On investigation he had learned that the license plates assigned to the Avis Rambler by the Maryland State Department of Motor Vehicles were numbered "DD 1856," and the number "CB 7027" had been assigned to the Hertz Ford. He was then asked a series of leading questions which, upon the officer's answers, purported to prove that, on April 23, 1969, two days before Drew's arrest, he had also observed the Hertz Ford which now bore its own tags, Maryland "CB 7027," seen previously on the Avis Rambler, parked in front of the apartment in which defendant was living. (Tr. 54-57). On April 25th, however, the tags on the Hertz Ford were Maryland "DD 1856," the tags assigned to the Avis Rambler (Tr. 58).

No testimony was ever offered to connect defendant with the Avis Rambler.

Thus, on the state of the evidence at the close of the Government's case, the testimony permitted a finding that, two days prior to Drew's arrest in the stolen Hertz Ford, the car had been seen parked in front of his address bearing Maryland license plates number "CB 7027."

As a part of its rebuttal, the Government recalled Detective Long to testify to the defendant's explanation of his possession of the stolen automobile at the time of his arrest, inconsistent with his testimony at trial, and, following cross-examination, offered as corroborative evidence a "PD 163" Form, the officer's prosecution report, as Government Exhibit No. 36. Only that portion relating to the defendant's prior inconsistent statement was admitted (Tr. 254), although the entire document was marked as an Exhibit. Both the "PD 163" Form, and the "continuation" (PD 202) thereof, record the license tag on the Hertz Ford on the two occasions it was observed by the officer as Maryland number "DD 1856."[5/] No evidence of record indicates that the defendant or his attorney were ever advised that the written statements of Detective Long were inconsistent with his apparent earlier testimony, or the ensuing argument of the prosecutor. No evidence of record indicates that defense counsel was shown any part of the statement other than that admitted in evidence.

5/ PD 202: "About 2:30 P.M. Wed. April 23, 1969, Dets. Long & Miller, Auto Theft Unit, observed a 1969 Ford 4 dr. Galaxie 500, Red in color, Md. Reg. DD 1856, parked in front of 3455 Minn. Ave." (Lines 15-16).

PD 163: "About 12 Noon April 25, 1969, the above described auto, was found parked in front of 3455 Minn. Ave., S.E., bearing a set of Md. Tags DD 1856." (Lines 5-6).

If, of course, defense counsel had access to the statements, the testimony, connecting defendant with sixteen of the allegedly forged credit sales slips and the stolen automobile through the common license plate number appearing on the credit slips, could have been impeached. And the jury might properly have inferred, or at least been asked to infer, that the unidentified thief of the stolen Avis Rambler, last seen bearing the incriminating license number after the last of the credit slips had supposedly been negotiated, was the party guilty of all the crimes charged, leaving Drew guilty, if at all, of nothing more than receiving stolen property.

In Brady v. Maryland, 373 U.S. 83, 10 L.ed. 2d 215 (1964), the Supreme Court held that the suppression by the prosecution of material evidence favorable to an accused upon request violated Due Process, irrespective of the good faith or bad faith of the prosecution. And, in Giles v. Maryland, 386 U.S. 66, 17 L.ed. 2d 737 (1967), in reversing a conviction for rape, the Supreme Court held that the prosecution's failure to disclose to the defense, even in the absence of a request, information in its possession as to the complainant's promiscuity, and her prior inconsistent statement as to the number of her assailants, constituted a denial of Due Process.

Even before the Supreme Court elevated the requirement of voluntary disclosure by the prosecution of evidence favorable to an accused to constitutional stature, however, this Court found it necessary, in Griffin v. United States, 87 U.S. App. D.C. 172, 183 F.2d 990 (1950), to order a new trial following a conviction of murder at a trial in which the decedent's possession of

an open penknife, known to the prosecution, was not made known to the defense. The Court said:

> "The ultimate question is whether the District Court erred in refusing to grant a new trial when it appeared that after the homicide an open penknife was found in the same trousers pocket of the deceased in which his hand was, and that the prosecution knew at the time of the trial that such testimony was available but neither produced it in court nor disclosed it to the defense.
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> . . .
>
> "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion, which the District Court sustained and no court has overruled it until today. However, the case emphasized the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States attorney is the representative not of an ordinary party to a controversy, but of the sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" [Citing Berger v. United States, 295 U.S. 78, 79 L.ed 1314 (1935)]

More recently, in a protracted habeas corpus proceeding following a conviction for grand larceny, which began as Levin v. Katzenbach, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966), and concluded as Levin v. Clark, 133 U.S. App. D.C. 6, 408 F.2d 1209 (1967), this Court held that the Government's fail-

ure to reveal to the defense, even if innocently neglected, a prosecution witness's lack of memory of an incident of the offense charged warranted reversal and a new trial. Evidence which the Government was obliged to disclose, the court said, was simply evidence which "... might have lead the jury to entertain a reasonable doubt about [defendant's] guilt." 124 U.S. App. D.C., 158, 162; 363 F.2d 287, 291. The Court said:

> "We would be required to reverse, then, even if the statement's only significance were in the way a jury might have viewed it. However, the statement has another importance. With knowledge of [the witness's] statement, defense counsel certainly would have probed deeper into what was the central aspect of the Government's case." 133 U.S. App. D.C., 12.

B. The prosecutor repeatedly misrepresented in closing argument the evidence as to the license plate number on the stolen car at the time of defendant's arrest, thus connecting him with the alleged forgeries through the common license plate number.

Even more prejudicial to defendant in the instant case, however, was the prosecutor's rhetorical repetition of the substance of testimony he said proved defendant's presence in an automobile bearing the same license number as that appearing on the credit sales slips said to have been forged. Although Detective Long ultimately did testify that, on April 25, 1969, the stolen Hertz Ford bore Maryland tag number "DD 1856," (Tr. 58), the prosecutor urged the jury to connect the stolen automobile, with defendant in it on April 25, 1969, with the forged credit sales slips through the common license

tag number "CB 7027." [6]

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[6] "Two days later, he was cruising around the area with Detective Walker of the Auto Theft Unit, and he saw the same car because by that time he knew it was a stolen car.

He parked several cars down, and waited for the man who had been driving the car to unlawfully get into it and drive away.

After 10 or 15 minutes, the man got into the car, and the officers let him drive a bit. He drove into a parking lot, and there the police officers put him under arrest.

The license tag was CB 7027. When you go into your Jury Room, remember that license number, CB 7027. Maryland registration. Remember it when you take the evidence into the Jury Room with you. (Tr. 260-261).

. . .

But, consider, ladies and gentlemen, that this is Theodore Cooper's Esso card, with this number stamped onto all of these 28 documents, bears for the most part license number CB 7027, the same license as on the car, stolen car, that the defendant, Nathan Drew, was arrested in.

Some of the license tags that appear here are not CB 7027, but you will see as you go through these documents that those which do not bear that license number precede December 3rd, when the car was stolen.

But from, I believe it is December 6, onwards, your own examination will determine the dates for you.

But from about December 6th onwards, the license number is CB 7027, and that is the car that Nathan Drew was arrested driving in. (Tr. 274).

. . .

Handwriting experts, scientific proof that Nathan Drew is the man who was driving the stolen car.

And the first document, bearing a license number, CB 7027, was on December 6, 1968, three days after that Hertz car was checked into Virginia's National Airport. (Tr. 277).

. . .

No matter how you twist or no matter how you squirm, Nathan Drew is the man who presented this Esso card. Nathan Drew is the man who had this card in his wallet.

Nathan Drew is the man arrested in the stolen car. Nathan Drew was arrested in the vehicle that bore the license CB 7027, and Nathan Drew is the man that filled out those cards, most of which, after December 26, bear the license number CB 7027." (Tr. 290).

This Court has held a less egregious (and unrepeated) misstatement of a defendant's alibi evidence in a prosecutor's closing argument reversible error requiring a new trial. Corley v. United States, 124 U.S. App. D.C. 351, 365 F.2d 884 (1966). And it has noticed improper argument by the prosecutor as "plain error" under Rule 52(b), F.R.Crim.P., even in the absence of objection or assignment of error on appeal, Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d 42 (1967).

In Berger v. United States, 295 U.S. 78, 79 L.ed 1314 (1935), reversing a conviction for cross-examination and argument by a prosecutor which misstated evidence, the Supreme Court said:

> "That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistenting cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.
>
> . . .
>
> The United States Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a

case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocense suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

. . .

> "In the these circumstances prejudice to the cause of the accused is so highly probably that we are not justified in assuming its non-exixtence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached. [Citations omitted] Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded." 295 U.S., 84-89.

Berger was most recently cited by this Court (in holding that the prosecutor erred in arguing to the jury the existence of testimony he had forgotten to elicit from a witness) in Gaither v. United States, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969), stating:

> "We have found error in prosecutorial misstatements even where, as here, they were apparently made in good faith. We have not regarded the standard judicial caution that the jury's recollection controls as a cure-all for such errors. We have noticed such errors where they were not objected to at trial, or even on appeal. Thus here, where timely objection was made and pressed on appeal, we must carefully examine the error committed to determine whether it sufficiently prejudiced appellants to call for reversal.
>
> The applicable test for prejudice is whether we can say, 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.' The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." 134 U.S. App. D.C., 172.

In the instant case, unlike Gaither where the error was held to have been not unduly prejudicial, the evidence against Drew, at least insofar as the forging and uttering counts are concerned, was not overwhelming. It consisted of the handwriting expert's testimony that he had signed the name of "Theodore G. Cooper" (and his possession of the credit card) balanced against his own testimony that he had not signed them (and a denial of possession of the credit card). The corroboration provided by the common license tag number made the evidence "central," therefore, as the prosecutor's frequent allusions to it reveal. Finally, unlike Gaither, neither defense counsel nor the court was alert to the prosecutor's error, and neither therefore took any measures to redress it. Under the tests prescribed in Gaither, supra, the misargument must be deemed prejudicial.

III. THE PROSECUTOR'S IMPROPER CROSS-EXAMINATION OF DEFENSE WITNESSES WAS PREJUDICIAL.

Two defense witnesses were interrogated as to whether they had been in jail at various times, although neither incarceration was shown to have been the result of a final conviction for a crime.

Defendant called two witnesses to corroborate his testimony with respect to his presence in the stolen Hertz Ford, viz., that the automobile was possessed by a friend of his brother's, one Bryant, and was being demonstrated to him as a prospective purchaser by Bryant on the morning of his arrest. One witness was defendant's brother, Maurice Drew, in whose apartment at 3455 Minnesota Avenue, N.W., defendant was living; the other was Andre Mordecai, another acquaintance at the apartment that morning. (Tr. 117-164).

At the outset of his cross-examination of Maurice Drew, the prosecutor asked:

"Q. Where did you say you are living now?
A. At the present time I am living at 1401 Girard Street, Northwest.
Q. Is that where you were last night?
A. Last night?
Q. Yes.
A. No, sir.
Q. Where were you last night?
A. Over at District Jail last night.
Q. That is where you are living now, isn't it?
A. No, sir. I am not living there.
Q. Is your brother going to testify in your case?
A. Is my brother going to testify in my case?
Q. Yes.
A. He has no knowledge of it.
Q. Is he going to testify in your case?
A. If he has no knowledge--
MR. GARBER: Your Honor, I object.
THE COURT: The objection will be sustained." (Tr. 123).

The reason for the witness' incarceration was not pursued further. However, in the course of cross-examination designed to discredit the witness' assertion that the car was in Bryant's possession by showing lack of opportunity to have observed, the prosecutor asked:

> "Q. When were you locked up for the charge that you are presently in jail on?" (Tr. 131).

Objection was sustained as to the "form" of the question (Tr. 131), but the interrogation continued as to how long he had remained at liberty after defendant's arrest and what he had done in the interim to locate "Bryant." (Tr. 132).

Andre Mordecai's cross-examination began with impeachment with a prior conviction, admitted by the witness, for petty larceny in 1967. The next question was:

> "Q. On April 25, were you out on bond in another case?" (Tr. 162).

The objection was sustained (Tr. 162), and no further questions were asked about the "other case."

However, no other corrective action was taken at any time by the trial judge, and the jury undoubtedly were left with the impression that both defense witnesses were themselves at least suspected criminals, with whom defendant was consorting at the time of his arrest.

It has been the rule in this jurisdiction, at least since Sanford v. United States, 69 App. D.C. 44, 98 F.2d 325 (1938), that it is improper, for impeachment purposes, to show accusation, arrest, or indictment of any witness in any proceeding, civil or criminal. Cf. McGill v. United States, 106 U.S. App. D.C. 136, 270 F.2d 329 (1959); Lee v. United States, 125 U.S. App. D.C. 126, 368 F.2d 834 (1966). In Michelson v. United States, 335 U.S.

409, 93 L.ed. 168 (1948), Mr. Justice Jackson wrote:

> "Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness." 335 U.S., 482.

Unless, therefore, the Government was prepared to, and did thereafter, prove that the witness Maurice Drew had spent the preceding night in jail, and the witness Andrew Mordecai had been "out on bond in another case" on April 25, 1969, as a consequence of a final conviction of guilt as to each, the questions were improperly intended to discredit both witnesses and defendant by an inference of criminality from the fact of incarceration alone without the necessary predicate. Thomas v. United States, 74 App. D.C. 167, 121 F.2d 905 (1941); District of Columbia Code, Section 14-305 (1967 ed.). The questions posed to each witness, moreover (as to whether defendant would subsequently testify in his brother's case, and as to whether Mordecai was "out on bond," implying either trial or appeal still pending) suggest that the prosecutor, in fact, knew that neither incarceration was the result of a final conviction at the time.

In Brown v. United States, 119 U.S. App. D.C. 203, 338 F.2d 543 (1964), this Court (Burger, J.), reversed a robbery conviction, holding that the trial court had committed reversible error in, inter alia, allowing the Government, over objection, to cross-examine a defense witness almost precisely as the prosecutor interrogated here. The Court said:

> "When appellant's juvenile companion, Belton, testified, the prosecutor on cross-examination asked him where he was then residing. Defense

counsel twice made timely and pointed objection to the question and the probable response, claiming at the bench that the answer would be "The National Training School" where appellant had been committed for complicity in another charge. The question was allowed and the predicted answer was forthcoming. The prosecutor then asked: 'For what particular crime? Was it for this crime?', Belton replied, 'No, sir.'

The Government contends that this line of questioning was proper to lay a foundation for cross-examination of Belton on his opportunity to discuss the case with appellant and fabricate testimony. This argument suffers from two basic fallacies. First, the testimony relevant to this argument was brought forth subsequently when Belton admitted that he and appellant had been together at the Receiving Home, not the National Training School, where Belton had been placed only one day prior to testifying. We assume that the prosecutor was unaware of this fact and that his attempt to lay a foundation of opportunity for collusion was in good faith; nevertheless, it was his responsibility to appraise the possible prejudice of the predicted answer before asking a question otherwise probably inadmissible.

. . .

The Government does not contend that the inquiry was permissible on impeachment grounds; it was not. Although conviction of certain criminal offenses is a valid subject of examination aimed toward impeachment of a witness, a finding of involvement in law violation resulting in commitment to the National Training School is not the equivalent of a criminal conviction on any theory. [Citation omitted] The District of Columbia Code only makes provision for impeachment upon showing 'conviction of crime.' Indeed, the prosecutor's question to Belton characterized the occasion for his commitment to the National Training School as 'for [a] crime.' The very form of the question ignored both the statute on impeachment and the essential nature and purpose of the Juvenile Court Act. Because of the purpose of the Juvenile Court Act and the absence of procedural safeguards, a finding of involvement against a juvenile

> does not have the same tendency to demonstrate his unreliability as does a criminal conviction for the adult offender." 119 U.S. App. D.C., 205-207. (emphasis supplied).

In the instant case, of course, the trial court sustained defense counsel's objections to the questions asked Maurice Drew and Andre Mordecai. But the magnitude of the prejudice worked required more. As the Supreme Court said in Berger v. United States, 295 U.S. 78, 79 L.ed. 1314 (1935):

> "The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken." 295 U.S., 85.

In the instant case, appellant submits that, whatever the reasons for his witnesses' incarcerations they were not shown to have resulted from final convictions for crimes, and were, thus, the equivalent of and no more admissible than the fact of the witness Belton's "residing" at the National Training School following a finding of his "involvement" in Brown, supra. He also submits that the various remedies available to the trial judge to dispel the impression undoubtedly given the jury that criminals keep company with other criminals should have been but were not employed, and the failure to do so was prejudicial error.

IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE DOCUMENTS ALLEGED TO HAVE BEEN FORGED IN EVIDENCE WITHOUT AUTHENTICATION, AND ERRONEOUSLY DENIED DEFENDANT'S MOTION FOR ACQUITTAL ON THE "UTTERING" COUNTS ON THE GROUND THE DOCUMENTS PRIMA FACIE PROVED UTTERING.

That portion of the credit sales slips other than the signature alleged forged was never identified, and could not itself prove the instruments had been uttered.

The "credit sales slips," Government Exhibits Numbers 2-29 (including both those for which defendant was indicted and the others) were identified by Detective Long as follows:

> "I received these copies of credit cards [sic] from Pennsylvania from the Humble Oil and Refining Company after having a conversation with them on the phone. They mailed them to auto squad office." (Tr. 74).

Over defense objection as to the absence of authentication (Tr. 75), before the exhibits were offered or admitted into evidence, Detective Long was permitted to testify as to "what information is contained on these sales tickets," stating:

> "A. It contains the same number which is the same number that was on the permanent record of the Esso Credit card. The Number is 341-364-684-4. Each one of these copies of this card contains the name and address of the filling station, that someone has obtained gas with this credit card. It also contains the signature of the subject that passed or rather signed his name or someone else's name, and also contains the license number of the car that the subject was operating at the time these credit cards were forged.
>
> Q. Does it also contain the items purchased and the cost of those items?

A. Yes, sir. It does.

Q. You said each of these items. Are these individual items or just copies of the same item?

A. Copies from different filling stations, different items." (Tr. 76).

The exhibits were finally offered, and, over objection, received in evidence at the close of the Government's case. (Tr. 103-104). Thereafter, the trial court apparently denied defendant's motion for judgment of acquittal on the "uttering" counts (Counts 3, 5, and 7), presumably on the ground that the credit sales slips, by the entries purporting to indicate that merchandise had been exchanged for them at various service stations, constituted a prima facie case of uttering. (Tr. 106-114).

Government Exhibits Numbers 2-29 are all carbon copies of original credit sales slips. In addition to the carbon duplication of the handwritten signature "Theodore G. Cooper" on each, each also bears reproductions of stamped names and addresses of various service stations, and handwritten entries by unknown attendants purporting to indicate the merchandise delivered on the credit of the signature and the license number of the car to which it was delivered. To establish the authenticity of each, therefore, as a forged instrument unlawfully uttered, it was necessary to show that this document, on which the defendant had signed the name of "Theodore G. Cooper," was "passed, uttered, or published" to someone with the requisite culpable intent.

Assuming the testimony of the handwriting expert sufficiently authenticated the handwriting of defendant in the signature "Theodore G. Cooper," the remainder of each exhibit received no authentication whatsoever. At

best, Detective Long could testify, of personal knowledge, that the exhibits had been received in the mail by the auto squad office, following his telephone call to a number he understood to be that of the office of the Humble Oil and Refining Company in Pennsylvania. Thus either the authorship of the balance of each slip was required to be proved by one having knowledge of it, or custody without alteration from the author shown, to qualify the document as evidence.[7/]

In United States v. Sutton (No. 22, 728, U. S. App. D.C., decided November 7, 1969) this Court said, in holding a writing attributed to the accused sufficiently authenticated by extrinsic circumstantial evidence of his authorship:

> "Ordinarily, documentary evidence possesses no self-authenticating powers; unaided by an operable presumption, its reliability is not automatically assumed. The legal requirement obtaining in normal contexts is that its genuineness be shown independently before it is accepted as proof.
>
> . . .
>
> Indubitably, the sufficiency of a showing of authenticity of a document sought to be introduced into evidence is a matter residing in the sound discretion of the trial judge. As is always true with discretionary exercises, there are discernible limits which judges must not transcend, but the judge's assessment of admissibility is vulnerable only if the error is clear. The applicable test to determine error is not whether the

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7/ Even then, of course, for the document to evidence what the Government sought to prove by it, viz., that it was put forward by the defendant in exchange for the merchandise, proof should be required: (1) that the "best evidence" was not available; and, (2) that it constituted an exception to the hearsay rule, e.g., a "business record" or "past recollection recorded." Otherwise, someone would have to testify to the facts.

> evidence of genuineness induces a belief beyond a reasonable doubt that the document is the handiwork of its alleged drafter, but whether, if it is uncontradicted, a reasonable mind might--though not necessarily would--fairly conclude favorably to the fact of authorship. In the case at bar, the contents of the questioned notes, conjoined with the circumstances surrounding their discovery, fashioned an adequate basis for the ruling admitting them in evidnece.
>
> We abide fully the usual judicial concession 'that the mere contents of a written communication, purporting to be a particular person's, are of themselves not sufficient evidence of genuineness.'" Slip Opinion, pages 8-9. (Emphasis supplied).

In the instant case, there was no extrinsic evidence of the genuineness of any part of the twenty-eight credit sales slips, other than the signature of "Theodore G. Cooper," direct or circumstantial. And the contents of each, according to Sutton, is still not sufficient in itself to authenticate a disputed document.

Without Government Exhibits Numbers 2-29, and the information they purport to convey about what merchandise was sold, by whom, and when, the Government's case contained no proof that the defendant "uttered" any of them. The documents were improperly admitted into evidence, and the motion to acquit on the charges of "uttering" should have been granted.

CONCLUSION

Appellant submits that the foregoing errors, and each of them, affect his substantial rights, and require that his conviction be reversed and a new trial ordered as to all counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief for Appellant was mailed, postage prepaid, this ____ day of _____, 1970, to Thomas Flannery, Esq., U.S. Attorney, U.S. Courthouse, Constitution and John Marshall Place, Washington, D.C. 20001.

_____
Thomas Penfield Jackson

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,004

UNITED STATES OF AMERICA, APPELLEE

v.

NATHAN L. DREW, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
SANFORD FRANKEL,
PHILIP L. COHAN,
Assistant United States Attorneys.

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

III

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether evidence of appellant's perpetration of other forgeries was properly admitted into evidence.
2. Whether the prosecutor's cross-examination of defense witnesses was improper.
3. Whether the credit card purchase receipts were properly admitted into evidence.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,004

UNITED STATES OF AMERICA, APPELLEE

v.

NATHAN L. DREW, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an eight-count indictment filed August 25, 1969, appellant was charged with interstate transportation of a stolen vehicle,[1] unauthorized use of that vehicle,[2] and three counts each of forgery and uttering.[3] Trial was held before the Honorable Leonard P. Walsh, sitting with a jury, on December 22-24, 1969, in which appellant was found

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[1] 18 U.S.C. § 2312.

[2] 22 D.C. Code § 2204.

[3] 22 D.C. Code § 1401.

guilty on all counts. On February 11, 1970, appellant was sentenced to imprisonment for a term of one year on the unauthorized use count and eighteen to fifty-four months on each of the remaining seven counts, all sentences to run concurrently. This appeal followed.

At trial the Government introduced evidence that a 1969 four-door red Ford Galaxie, belonging to Hertz Rent-a-Car, bearing Maryland license tags CB-7027, was removed from the National Airport, without authorization, on or after December 3, 1968 (Tr. 33-35, 40).

On April 11, 1969, Detective Robert J. Long of the Metropolitan Police observed the above-mentioned license tags, then expired, on a 1969 Rambler which he determined belonged to the Avis Company (Tr. 55). Further investigation disclosed to Detective Long that these tags had been issued to a Ford automobile owned by Hertz. On April 23, 1969, Detective Long observed a Hertz-owned Ford in front of 3455 Minnesota Avenue, Southeast (Tr. 58), bearing the license tags which he now knew belonged to the Avis Rambler; *i.e.*, Maryland DD-1856 (Tr. 56-57).[4] As a result of further investigation Detective Long determined that this Ford had been reported stolen. He thereupon, on April 25, returned to the Minnesota Avenue address to conduct a surveillance of the car (Tr. 58). After a wait of approximately fifteen minutes Detective Long observed appellant enter the Ford, which still bore the license tags belonging to the Avis vehicle DD-1856 (Tr. 58-59). Detective Long, together with Detective Stanley R. Walker, pursued appellant as he drove away and stopped him after he had traveled three blocks. Appellant was alone in the car (Tr. 60). Upon request appellant exhibited a driver's permit but was unable to produce a registration card (Tr. 60). As appellant searched through his wallet, Detective Long saw in the wallet an Esso credit card in the name of Theodore G. Cooper (Tr. 61). Detective Walker also observed this Esso credit card in appellant's wallet (Tr. 73, 85).

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[4] See note 15, *infra*.

Detective Walker, in addition to corroborating the testimony of Detective Long, testified that some time after appellant's arrest, and in response to his telephone call, he received twenty-five credit card purchase receipts (Government's Exhibits 5 through 29) from the Humble Oil and Refining Company in Pennsylvania (Tr. 74). Each of these receipts recorded a transaction in which gasoline purchases were made over a signature purporting to be that of Theodore G. Cooper (Tr. 76).

Irby Todd, handwriting identification expert, testified to having compared handwriting exemplars executed by appellant with the signatures appearing on the credit card receipts. It was his opinion that all of the receipts had been signed by appellant (Tr. 92). A similar opinion from a handwriting expert appointed by the court, John Orr, was then introduced into evidence by stipulation (Tr. 102-103).

Theodore G. Cooper, owner of the Esso credit card, testified that his card had been stolen and that appellant, whom he did not know, had never been given permission to use it nor authorized to sign Cooper's name (Tr. 43).

Maurice Drew, appellant's brother, was the first defense witness. He testified that on April 25, 1969, the date of appellant's arrest, he was living with appellant at 3455 Minnesota Avenue, Southeast, and on that date saw appellant leave their home with William Bryant and enter a red 1968 Ford which he thought belonged to Bryant (Tr. 118-119). Drew testified that he had previously known Bryant and introduced him to appellant because Bryant had expressed an interest in selling the Ford, and he thought appellant might be interested in buying it (Tr. 121). Except for one trip to the Billiard Club, Maurice Drew made no effort to locate Bryant after appellant's arrest (Tr. 133).

Andrew Mordecai testified that he also was present at 3455 Minnesota Avenue on the day of appellant's arrest and had seen Bryant arrive. Shortly thereafter he saw appellant and Bryant leave together in a red car (Tr. 160-161).

Appellant testified that he had gone for a ride with Bryant to pick up some groceries (Tr. 168). As they drove into a shopping center parking lot, Bryant jumped out of the car and ran away. The police arrived immediately thereafter (Tr. 168-170). In the process of searching him, one of the policemen went through appellant's wallet but removed nothing. Then one policeman asked appellant where he had obtained a certain Esso credit card, but appellant claimed no knowledge of the card, having "no idea" where the policeman had found it (Tr. 171). Appellant denied having signed the name Theodore Cooper, explaining:

> I will say it is almost impossible for me to have done that . . . because during this time I, myself, had two checks taken from me and my name was forged on the checks so I say that because it must have been if according to what the testimony, that the handwriting expert said it was so clear, it must have been the same fellow that did that because it wasn't me. (Tr. 172.)

Appellant also denied taking the Hertz Ford from National Airport and driving it into the District of Columbia (Tr. 174).

In rebuttal Detective Long testified that the only occupant of the car was appellant and that when stopped he stated that his brother had rented the car a week before from Hertz (Tr. 253).

ARGUMENT

I. Evidence of appellant's perpetration of other forgeries was properly admitted into evidence.

(Tr. 61, 73, 85, 92, 94, 95-98, 101-102, 172)

In his first argument appellant challenges the trial court's admission into evidence of the twenty-five Esso purchase receipts which, although signed by appellant, were not the subject of any of the counts charged in the indictment. In arguing that this evidence was irrelevant, ap-

pellant relies on the fact that he "denied any knowledge of those slips whatsoever. Thus, his intent, or his guilty knowledge was never a disputed issue (except in the general sense that intent is an element of the crimes charged) . . . ." (Br. 7). Notwithstanding appellant's parenthetical deemphasis of the Government's burden in this trial, a contrary conclusion was approved by this Court in *United States* v. *Gay*, 133 U.S. App. D.C. 337, 410 F.2d 1036 (1969), quoting from Dean Wigmore's text on evidence:

> In a number of rulings involving these principles, the question has been raised whether it is proper to introduce the evidence of other offenses during the prosecution's case in chief. The argument against doing so is that if the accused's evidence should deny the doing of the act, then no issue of Intent can arise, hence, that the evidence of former offenses could only prejudice the accused unless it involved Motive or Design. The answer is that intent in virtually all offenses is material, and is therefore part of the case to be proved in chief; and that *unless the precise defense be disclosed in advance, the prosecution may in fairness assume that Intent may come into issue.* J. WIGMORE, EVIDENCE § 307 (3d ed. 1940) (emphasis added).[5]

In the instant case the Government was obliged to prove beyond a reasonable doubt that appellant had the specific intent to defraud. To show this intent the Government introduced evidence of appellant's possession of a stolen credit card, and from this evidence the jury could infer that appellant knew that this card was stolen. *United States* v. *Johnson*, D.C. Cir. No. 22,311, decided September 4, 1970. Additional evidence was offered to prove that appellant had signed the name of the rightful owner of the credit card on twenty-eight separate occasions, and from this evidence of repeated use of the stolen card the jury was asked to infer the requisite intent to defraud. Thus offered, the admission of such evidence has

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[5] *United States* v. *Gay*, *supra*, 133 U.S. App. D.C. at 340-341 n.5, 410 F.2d at 1039-1040 n.5. *See also United States* v. *Bussey*, D.C. Cir. No. 22,919, decided July 21, 1970, slip op. at 5 n.13.

met with prior approval in this Court's decision in *United States* v. *Gay*, *supra*. In that case, the evidence of repeated acts was held to be probative of the defendant's intent to defraud inasmuch as it directly refuted any contention of innocent mistake. We submit that the similar evidence of repeated acts in this case is similarly probative.

Moreover, this evidence was admissible on additional grounds. In *Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964), a prior case coincidentally involving this same appellant, this Court noted five exceptions to the general rule of exclusion (*i.e.*, (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial) and then stated: "When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value." [6]

In addition to showing intent and absence of mistake, as discussed above, the challenged evidence was also relevant to show a common scheme or plan and identity. As to common scheme, the evidence was that *all* of the receipts exhibited appellant's handwriting and that a majority of the purchases were made in association with an automobile bearing Maryland license tag CB-7027. In a literal as well as figurative sense, appellant had placed his signature on these virtually identical transgressions. As to identity, the Government's only evidence linking appellant to the forgeries and utterings was the handwriting experts' testimony that appellant had executed these signatures. In cross-examination of the only expert who testified, appellant attempted to discredit this testimony by exposing the inherent limitations of handwriting comparisons and opinions based on such comparisons.

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[6] *Drew* v. *United States*, *supra*, 118 U.S. App. D.C. at 16, 331 F.2d at 90 (footnotes omitted).

However, since the expert had had twenty-eight separate signatures to compare, some less legible and less distinct than others, and yet was able to conclude that each of them had been executed by appellant, this evidence was clearly more persuasive than it would have been had the expert found the characteristics of appellant's handwriting on only three such receipts.

The well-recognized argument offered by appellant in support of the general rule of exclusion of evidence of other crimes is premised on the probability of prejudice flowing from the admission of such evidence. In the instant case, however, such prejudice was rendered highly unlikely by appellant's defense that some unknown person was repeatedly forging his handwriting. Appellant testified that someone had forged his endorsement to two Government checks and that this same person must have adopted this same handwriting when executing the credit card receipts, thus hoping to shift the blame to appellant. By so testifying appellant accepted the Government's proof that the signatures on each receipt were by the same hand, and sought to explain the similarity of that hand to his own as a purposeful act by the person who had allegedly stolen and forged his checks. Accordingly, the evidence of the twenty-five additional receipts was not inconsistent with appellant's defense, for one can fairly conclude that appellant's testimony explaining the appearance of "his" handwriting on the three receipts charged in the indictment was not altered merely by the acceptance into evidence of the twenty-five additional receipts bearing identical signatures.[7] Therefore, since the evidence in question was admissible under several exceptions to the general exclusionary rule, and the likelihood of prejudice was minimal, such evidence was properly accepted by the

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[7] Although the admission of evidence of other crimes was not accompanied by an instruction cautioning the jury as to the limited purpose for which it was being received (nor was such an instruction requested), *cf. United States* v. *Bussey, supra* note 5, where the probability of prejudice is slight the need for this instruction becomes proportionately less, and its omission does not rise to the level of reversible error.

trial court. *See Bradley* v. *United States*, D.C. Cir. No. 20,710, decided November 5, 1969; *cf. United States* v. *Bussey*, *supra* note 5.

II. The prosecutor's cross-examination of defense witnesses was not improper.

(Tr. 56-57, 117, 120, 123, 127-128, 129-134, 162, 261, 264, 289-290)

Appellant contends that the prosecutor's cross-examination of witnesses Maurice Drew and Andrew Mordecai was "improperly intended to discredit both witnesses *and defendant* by an inference of criminality from the fact of incarceration alone without the necessary predicate" (Br. 27) (emphasis added). In so characterizing the Government's cross-examination appellant fails to comprehend the clearly legitimate purposes for the prosecutor's interrogation. If one considers each instance of alleged impropriety in the context of surrounding defense testimony, the legitimate purposes become evident.

The first recited incident of alleged misconduct is the question to Maurice Drew as to where he had spent the evening preceding his testimony, with the answer elicited that he had been in jail. When this question and answer are isolated, as they are in appellant's brief, they appear to have a total irrelevance to the case on trial and suggest an improper motive by the prosecutor to brand the witness, and in so doing to encourage a finding of guilt by association. However, in the context of this witness' direct testimony and his representation that he was then living at 1401 Girard Street, Northwest (Tr. 117, 123), the prosecutor's question was simply, albeit sharply,[8] directed at exposing the falsehood of that prior testimony. In plain fact, Maurice Drew was at that time in custody at the District of Columbia Jail, and the prosecutor was fully within his rights to correct any different impression created by this witness. *See Alford* v. *United States*, 282

[8] *Taylor* v. *United States*, 134 U.S. App. D.C. 188, 189, 413 F.2d 1095, 1096 (1969).

U.S. 687 (1931); *United States* v. *Pugh*, D.C. Cir. No. 23,216, decided June 30, 1970. Appellant's counsel was aware of Drew's incarceration, and he could easily have protected against the introduction of this fact by clarifying his direct testimony.

Shortly thereafter the prosecutor inquired of Drew whether his brother, appellant, was going to testify in Maurice Drew's case. Although an objection to this question was sustained,[9] we submit that the question was entirely proper. It is well recognized in this jurisdiction that the trier of fact may consider bias or prejudice in weighing the credibility of witnesses, and this inquiry was clearly directed toward establishing exactly that.[10]

The next area of inquiry challenged by appellant is the prosecutor's examination of Maurice Drew with respect to what efforts had been made to locate William Bryant, the alleged possessor of the automobile in question. Unmistakably this inquiry was designed to lay a foundation for a later request to make a missing witness argument. Drew had attempted to explain Bryant's absence from the trial by testimony that Bryant was believed to have entered the armed services. However, vigorous cross-examination resulted in Drew's admission that although he had had ample opportunity to attempt to locate Bryant after appellant's arrest, with the exception of one trip to a pool room he had made no efforts toward achieving this objective (Tr. 133). To establish a satisfactory foundation of an opportunity to find Bryant, it was necessary

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[9] The record does not disclose the court's reasons for sustaining the objection. However, we note that the witness had provided an answer when the question was first asked, and therefore the repeating of the question verbatim was objectionable on its face. If appellant is now contending that this question was improper for the reason that it assumed a fact not in evidence, *i.e.*, that Drew was in jail by reason of a "case," we maintain that to probe in this area was completely proper when, as here, the legitimate purpose was to establish the witness' possible bias or prejudice.

[10] *Tinker* v. *United States*, 135 U.S. App. D.C. 125, 417 F.2d 542, *cert. denied*, 396 U.S. 864 (1969); *see* JUNIOR BAR SECTION OF D.C. ASS'N, CRIMINAL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA, No. 11 (1966), and cases cited therein.

for the prosecutor to foreclose any argument by defense counsel that incarceration of Maurice Drew had deprived him of this opportunity. We submit that the propriety of this inquiry is also supported by the numerous questions related to Drew's incarceration to which there was no objection, and to which no objection would have been sustainable.

The cross-examination of Mordecai was similarly motivated. At the outset this witness' credibility was impeached through introduction of a prior conviction,[11] a procedure well accepted in this jurisdiction and authorized by statute, 14 D.C. Code § 305. Consequently, his criminal background was already very much in evidence. Immediately thereafter the prosecutor asked whether Mordecai was "out on bond in another case" (Tr. 162) on the date of appellant's arrest. The objection to this question was sustained.[12] As was the case with Maurice Drew, this witness was not the defendant, and consequently there was no possibility of the jury's misusing an indication of prior criminal conduct to infer guilt of the crimes presently charged. *United States* v. *Bailey*, —— U.S. App. D.C. ——, 426 F.2d 1236 (1970). Nor was this question an attempt to impeach the witness' veracity.[13] Rather, the question was designed to inquire into possible residual bias and prejudice of this witness toward the prosecuting authorities, which, we submit, is a legitimate area of inquiry and a subject about which the jury was entitled to be informed. In any event, the topic was not further pursued, and thus, even if we assume *arguendo* that this question exceeded the bounds of proper cross-examination, we fail to concur in appellant's con-

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[11] This was done only after a hearing pursuant to *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 703 (1965).

[12] Appellant suggests that some "other corrective action" (Br. 26) should have been taken but fails to designate what action he has in mind. There was no answer given to the question, so no admonition to disregard the answer was appropriate, and as part of the court's general instructions the jury was advised that testimonial evidence comes from the witness stand (Tr. 294).

[13] This had already been done by the introduction of a prior larceny conviction (Tr. 162).

clusion that the question resulted in such substantial [14] prejudice as to require reversal of his convictions, particularly in view of the strong evidence of appellant's guilt. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-240 (1940). *Compare Jones* v. *United States*, 119 U.S. App. D.C. 213, 338 F.2d 553 (1964).[15]

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[14] *See Cross* v. *United States*, 122 U.S. App. D.C. 285, 353 F.2d 454 (1965).

[15] Appellant also urges reversal of his convictions because of alleged misconduct by the prosecutor in suppressing evidence favorable to the defense. *Brady* v. *Maryland*, 373 U.S. 83 (1964). However, examination of the record discloses that the foundation for this argument is nonexistent. Appellant claims that Detective Long first testified that on April 23 the Hertz Ford was observed with Maryland tags CB-7027, but that his report of the offense stated that the Ford bore Maryland tags DD-1856. Appellant's claim is simply not accurate, for the record clearly reflects that the tags belonging to the Avis Rambler were Maryland DD-1856 and that these tags were on the Hertz Ford on April 23:

> Q: What was the proper tag for the Rambler?
> A: Maryland, D, David, D, David, 1856.
> Q: Officer, on April 23rd, 1969, did you see any vehicle in the District of Columbia that had the tags that belonged to the Avis Rambler which you had already found?
> A: Yes, Sir.
> Q: What kind of car was that?
> A: It was a 1969 Ford, red in color. (Tr. 56-57.)

A further allegation of misconduct is that the prosecutor misrepresented the evidence in his closing argument. As appellant accurately points out in his brief, the prosecutor erred in stating that appellant was arrested in an automobile bearing license tags CB-7027, for, as stated above, that car bore the DD-1856 tags. However, we fail to concur in appellant's characterization of this as misconduct, nor do we share his view of its effect on the jury. *See Cross* v. *United States*, *supra* note 14. First, the tags CB-7027 did in fact belong to the automobile in which appellant had been arrested and had been on that vehicle when it was stolen on or after December 3, 1968. Second, this misstatement can hardly be considered severe when neither appellant nor his counsel was disturbed by it at the time it was made. Third, the members of the jury were properly instructed that their recollection of the facts in evidence was controlling. *See Spencer* v. *Texas*, 385 U.S. 554 (1967). Finally, in view of the undisputed evidence by two experts that appellant had signed all of the credit card receipts, it is not likely that his arrest in a car bearing tags similar or identical to the recorded tags of the automobile associated with the credit card purchases was the "central" evidence (Br. 24) supporting his convictions.

III. The credit card purchase receipts were properly admitted into evidence.

Appellant argues that the absence of any testimony to authenticate the credit card purchase receipts was fatal to their admissibility. Appellee understands appellant's argument to consist of two separate questions: (1) whether these receipts, absent testimony supporting their authenticity, could qualify as evidence, and (2) whether, as acceptable evidence, these receipts were competent to show that credit card purchases had been effected on the dates and in the amounts recorded on the receipts.

As to (1), it is accurately noted by appellant that the only testimony supporting the admission of these documents was the testimony of Detective Walker that he had telephoned Humble Oil Company and had thereafter received these documents through the mail. However, abundant additional indicia of their authenticity were clearly present on the face of these documents. Bearing in mind that this threshold question is simply whether the receipts, in and of themselves, established their own authenticity as records of purchases from the Humble Oil Company, we submit that they are in effect self-authenticating. *See United States* v. *Sutton*, —— U.S App. D.C. ——, 426 F.2d 1202 (1969); *Hymes* v. *United States*, 260 A.2d 679 (D.C. Ct. App. 1970).[16] The trial court's discretionary determination that the documents would speak for themselves should not be disturbed absent a clear showing of abuse of that discretion. *United States* v. *Sutton*, *supra*, —— U.S. App. D.C. at ——, 426 F.2d at 1207. Although appellee acknowledges that the concept of self-authentication is an exception to the general rule requiring an independent showing of genuineness, we maintain that the instant documents present an appropriate opportunity to apply this exception and submit that examination of Government exhibits Nos. 2 through 29 convincingly supports our position.

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[16] *Hymes* was followed in *Marganella* v. *United States*, 268 A.2d 803 (D.C. Ct. App. 1970).

In *Hymes* v. *United States, supra,* the District of Columbia Court of Appeals was faced with these two identical questions, although the opinion of that court expressly answers only the second question. Hymes was convicted of seven counts of false pretenses [17] upon evidence which showed only that the owner of the credit card had never used the card nor authorized anyone else to use it, that the owner had received bills and charge receipts from the American Oil Company, and that in the opinion of a handwriting expert Hymes had executed the signatures that appeared on those receipts. The similarity to the instant case is striking. The only difference is that in *Hymes* the oil company had mailed the receipts to the owner of the card, whereas here the receipts were mailed directly to the police. This disparity, we submit, is insubstantial. In sustaining the conviction the *Hymes* court stated:

> In this case the Government introduced in evidence the seven purchase receipts. It could be inferred from these slips that gasoline was provided with reliance on the validity of the credit card and the authorized use thereof. It is true as the Government concedes, that none of the service station attendants in these seven isolated purchases could so testify. It is not unreasonable that a gas station attendant would not recall a single sale which took place sometime in the past. We do not feel that this "failure" to produce evidence was crucial to the Government's case. 260 A.2d at 680-681.

Admittedly, the Court in *Hymes* did not expressly direct itself to the first question of those posed above, but an affirmative answer to that question is implied from the absence of any evidence directly establishing that the receipts were in fact receipts of the American Oil Company. That court recognized that the proliferation of prosecutions for the unauthorized use of credit cards (albeit the court was there referring specifically to the

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[17] 22 D.C. Code § 1301.

crime of false pretenses) had post-dated the enactment of the applicable criminal statutes. In the absence of new legislation directed to such activities, the court did not hesitate in requiring the Government to adduce proof of all the elements of the offenses proscribed by the existing statutes. What the court did do, however, was to exercise its discretion [18] in favor of accepting a somewhat lesser degree of extrinsic authentication of documents which are currently in "wide use" [19] (and, implicitly, well recognized by most persons). Not only did the *Hymes* court find the purchase receipts competent and admissible evidence, but it further held that from such evidence the trier of fact could infer "that gasoline was provided with reliance on the validity of the credit card and the authorized use thereof." [20]

It is generally recognized in this jurisdiction that the elements of uttering a forged instrument are as follows:

(1) That the writing in question was falsely made or altered;
(2) That the defendant passed or attempted to pass the writing to someone representing it to be true and genuine;
(3) That he did so knowing it was falsely made or altered;
(4) That he did so with specific intent to defraud; and
(5) That the falsely made or altered writing was apparently capable of effecting a fraud.[21]

Of these five elements, the only evidence offered in the instant case to show the second and fifth was the purchase slips themselves. However, these are virtually the identical elements referred to in *Hymes* as "obtaining" and "reliance," those being requisite elements of the crime

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[18] *United States* v. *Sutton, supra.*

[19] *Hymes* v. *United States, supra,* 260 A.2d at 680.

[20] *Id.* at 680-681.

[21] *See* JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 71(b) (1966).

of false pretenses. We submit that since the receipts themselves have been held competent evidence to show that gasoline was provided with reliance upon the validity of the credit card, then they are competent to show the representation of geniuneness and to show that the writing was apparently capable of effecting the fraud.

Accordingly, we submit that the challenged evidence was admissible and sufficient to sustain appellant's convictions of uttering.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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